KATHERINE WENTWORTH

v.

NEW SOUTH WALES BAR ASSOCIATION

HIGH COURT, AUSTRALIA
BRENNAN J
DEANE J
DAWSON J
TOOHEY J
GAUDRON J
[F.C. 92/020]
3 JUNE 1992

LEGAL PROFESSION: *Application for admission before examination requirements satisfied - Whether appellant fit and proper person - Bar Council or Bar Association should be the party to the proceeding - Whether Bar Council can adduce evidence - Discretion of Court.*

The appellant had successfully completed the examinations set by the Barrister's Admission Board for admission as a barrister under the Barristers and Solicitors Admission Rules 1989 (NSW). In July 1991, shortly before the appellant satisfied the board's examination requirements she filed an *ex parte* application in the Supreme Court New South Wales seeking an order that she be admitted as a barrister in New South Wales. It appeared that the Bar Council wrote to the board expressing the view that the appellant was not a fit and proper person to be admitted as a barrister. This was because the appellant's application was made before she had completed her examination and, thus, a question arose as to her qualifications.

The Court of Appeal had to consider the following issues:

(i) whether the Bar Association was a proper party to the proceeding; and

(ii) assuming the Bar Council became a party, whether it could lead evidence in opposition to the appellant's admission. The Court of Appeal dismissed the appellant's motion. She appealed.

Held:

[1] Section 51(b) of the Legal Profession Act 1987, apart from conferring an absolute right on the Bar Council, it does not affect the Court's power to determine how the proceedings are to be conducted, including who may participate and with respect to what issues.

[2] As the appellant's application sought orders against the Bar Association it involved an issue over and above that of her admission to the Bar, and the Bar Association was a necessary party to the proceedings. That being so, the matter was exceptional and the participation of the Bar Association rather than the Bar Council on the issue of admission was both convenient and appropriate.

[Appeal dismissed.]

Cases referred to:

In re Irvine [1909] 26 WN (NSW) 152 ***(cit)***
Ex parte Davis [1949] 50 SR (NSW) 158; [1962] 79 WN (NSW) 856 ***(cit)***
New South Wales Bar Association v. Davis [1963] 109 CLR 428 ***(cit)***
Re B [1981] 2 NSWLR 372 ***(cit)***
In re Davis [1947] 48 SR (NSW) 33; [1947] 75 CLR 409 ***(cit)***
In re John Cameron Foster [1950] 50 SR (NSW) 149 ***(cit)***
In Re Clyne ex parte New South Wales Bar Association [1961] SR (NSW) 104 ***(cit)***

Ex parte Korten [1941] 59 WN (NSW) 29 ***(cit)***
Ziems v. The Prothonotary of the Supreme Court of NSW [1957] 97 CLR 279 ***(cit)***
Houssein v. Under Secretary of Industrial Relations and Technology (NSW) [1982] 148 CLR 88 ***(cit)***
O'Sullivan v. Farrer [1989] 168 CLR 210 ***(cit)***
Ainsworth v. Criminal Justice Commission [1992] 106 ALR 11 ***(cit)***
Saunders v. Evans [1861] 8 HLC 721 ***(cit)***
Weaver v. Law Society of New South Wales [1979] 142 CLR 201 ***(cit)***
Re Veron; ex parte Law Society of NSW [1966] 84 WN (Pt. 1) (NSW) 136 ***(cit)***
Attorney-General of the Gambia v. N'Jie [1961] AC 617 ***(cit)***
Clyne v. NSW Bar Association [1960] 104 CLR 186 ***(cit)***
New South Wales Bar Association v. Evatt [1968] 117 CLR 177 ***(cit)***
Walter v. Council of Qld Law Society [1988] 62 ALJR 153; 77 ALR 228 ***(cit)***
Incorporated Law Institute of New South Wales v. Meagher [1909] 9 CLR 655 ***(cit)***
Bropho v. Western Australia [1990] 171 CLR 1 ***(cit)***
Corporate Affairs Commission (NSW) v. Yuill [1991] 172 CLR 319 ***(cit)***
American Dairy Queen (Q'ld.) Pty. Ltd. v. Blue Rio Pty. Ltd. [1981] 147 CLR 677 ***(cit)***
The Commonwealth and the Postmaster-General v. The Progress Advertising and Press Agency Co. Proprietary Ltd. [1910] 10 CLR 457 ***(cit)***
Annetts v. McCann [1990] 170 CLR 596 ***(cit)***
Ainsworth v. Criminal Justice Commission [1992] 106 ALR 17 ***(cit)***
Hammond v. The Commonwealth [1982] 152 CLR 188 ***(cit)***
Sorby v. The Commonwealth [1983] 152 CLR 281 ***(cit)***
Hamilton v. Oades [1989] 166 CLR 486 ***(cit)***
Tassell v. Hayes [1987] 163 CLR 34 ***(cit)***
Re Bolton; Ex parte Beane [1987] 162 CLR 514 ***(cit)***
Baker v. Campbell [1983] 153 CLR 52 ***(cit)***
Clancy v. Butchers' Shop Employees Union [1904] 1 CLR 181 ***(cit)***
Hockey v. Yelland [1984] 157 CLR 124 ***(cit)***
Public Service Association (SA) v. Federated Clerks' Union [1991] 173 CLR 132 ***(cit)***
Cameron v. Cole [1944] 68 CLR 571 ***(cit)***
Cocker v. Tempest [1841] 7 M & W 502 ***(cit)***
Jackson v. Sterling Industries Ltd. [1987] 162 CLR 612 ***(cit)***
The Queen v. Justices of London [1896] 1 QB 659 ***(cit)***
Board of Education v. Rice [1911] AC 179 ***(cit)***
National Companies and Securities Commission v. News Corpn. Ltd. [1984] 156 CLR 296 ***(cit)***
Kioa v. West [1985] 159 CLR 550 ***(cit)***

Legislation referred to:
Legal Profession Act 1987 [NSW], ss. 4(1), (2), (3), (4), 25(1)(a), 51(b), 133

Other source referred to:
Articles of the New South Wales Bar Association, Articles 45 & 61

For the appellant - H.D. Kelly
For the respondent - Michael Rosser & Co.
For the amicus curiae - H.K. Roberts

JUDGMENT

Brennan J:

I am in agreement with the reasons of Deane, Dawson, Toohey and Gaudron JJ for dismissing this appeal, subject to a qualification. I entirely agree that, in admission and disciplinary proceedings, the procedure is entirely in the hands of the Court subject only to statutory directions and the requirements of procedural fairness. That being so, the Court is entitled to seek and to receive assistance from such person as, in the opinion of the Court, are capable of providing it. I do not find in s. 51(b) of the Legal Profession Act 1987 (NSW), any express

or implied inhibition against the Supreme Court's practice of granting leave to the New South Wales Bar Association ("the Association") to appear to assist the Court in admission and disciplinary proceedings. Indeed, in some respects the Association, which is incorporated as a company limited by guarantee, is a more suitable party to such proceedings than the Bar Council. An order for costs made at any stage of a proceeding can be enforced directly against the Association; the changing membership of the Bar Council and the personal liability of Council members make an order for costs against the Bar Council a less satisfactory remedy. The Association, as the continuing entity representative of the practising Bar, prescribes and enforces the ethical standards of the profession. These factors do not diminish the importance of the Bar Council's statutory right to appear in admission and disciplinary proceedings. Rather, they indicate that the Bar Council, which has the powers of a board of directors of the Association (Article 61 of the *Articles of the New South Wales Bar Association*), is in a position to determine whether the more appropriate course in a particular case is to exercise its right to appear or to seek leave for the Bar Association to appear. To limit the Court's discretion to grant leave to the Bar Association to appear is, in my respectful opinion, neither required by the provisions of s. 51(b) nor consistent with the notion that the Court can determine its procedure according to its perception of the most appropriate course in the particular case.

I respectfully agree with their Honours that the Bar Council, if it were to appear in the proceedings, or the Bar Association is at liberty to adduce whatever relevant and admissible evidence that is available to it, to cross-examine and to make such submissions to the Court as are calculated to assist it in determining Ms. Wentworth's application for admission.

The appeal should be dismissed.

Deane, Dawson Toohey, Gaudron JJ:

Ms. Wentworth, the appellant, had successfully completed the examinations set by the Barristers Admission Board ("the Board") under the Barristers and Solicitors Admission Rules 1989 (NSW) ("the Rules") for admission as a barrister. In July 1991, shortly before she satisfied the board's examination requirements, Ms. Wentworth filed an *ex parte* application in the Supreme Court of New South Wales seeking:

1. An order that she be admitted as a barrister in New South Wales.
2. A declaration that she is entitled to and should be permitted to undertake the Bar Council's reading program commencing 5 August 1991.
3. An order that she be permitted to undertake the said reading program.
4. Such further and other order as the Court may see fit.

The Court was informed on the hearing of this appeal, which arises out of that application, that Ms. Wentworth no longer seeks relief in terms of O. 2 and O. 3.

Admission to practice as a barrister in New South Wales is governed by the Legal Profession Act 1987 (NSW), ("the Act") which provides, in s. 4 as follows:

(1) The Supreme Court may admit persons as barristers, whether or not as provided by subsection (2).

(2) The Supreme Court shall, on any day appointed by the Supreme Court for the purpose, hear and determine any application made on that day for the admission as a barrister of a person approved by the Barristers Admission Board as a suitable candidate for admission.

(3) A barrister is an officer of the Supreme Court.

(4) The Supreme Court Charter is revoked in New South Wales in so far as it relates to the admission of Barristers and Advocates.

It is common ground that, when made, Ms. Wentworth's application was for admission other than as provided by s. 4(2).

The application was first listed before Badgery-Parker J in the Common Law Division of the Supreme Court. Mr. Garling of Counsel announced his appearance for the Bar Association of New South Wales ("the Bar Association") and the Bar Council, but for the limited purpose of answering subpoenas. However, he observed, in relation to what was described in the application as "the Bar Council's reading program", that orders were sought against the Bar Association and submitted that Ms. Wentworth should be required to join it as a party. The reading program referred to is a training course for newly admitted barristers provided by the Bar Association.

The Bar Association is a company limited by guarantee. Its articles of association provide for "a Council of the Association" (Article 45) and for its business to "be managed by the elected members of (that) Council" (Article 61). It is that Council, constituted by its elected members, which functions as the governing body of the Bar Association and which has been referred to as "the Bar Council". The Bar Council has no separate legal identity but, as will later appear, it has specific statutory powers and functions in relation to barristers and candidates for admission to the Bar.

Before Badgery-Parker J, Mr. Garnsey, senior Counsel for Ms. Wentworth, raised no objection to the joinder of the Bar Association and, in due course, an order was made by his Honour to that effect. However, Mr. Garnsey stated that the Bar Council "ha(d) written an unequivocal letter gratuitously to a body which it was irrelevant to write to, setting out a point of view" and argued that, on that account, "the Bar Council has a duty to apply to be joined in these proceedings". The papers do not reveal what or to whom the Bar Council wrote but, given the issues raised, it seems likely that it wrote to the board expressing the view that Ms. Wentworth was not a fit and proper person to be admitted as a barrister. The Bar Council did not apply to be joined and is not a party to these proceedings.

The proceedings were listed for a second time before Badgery-Parker J when the Attorney-General for New South Wales, by his Counsel, appeared *amicus curiae* following a request to that effect made on the first occasion. The Attorney-General participated in subsequent stages of the proceedings and was granted leave to appear *amicus curiae* in this Court. On that second occasion it was ordered by Badgery-Parker J that the application be referred to the Court of Appeal.

Several interlocutory motions were taken out in the Court of Appeal. That Court ruled on three issues which arose out of those motions and which were advanced on behalf of Ms. Wentworth. Other issues remain to be determined. The first issue determined by the Court of Appeal was whether the Bar Association was a proper party to the proceedings; the second was whether, assuming the Bar Council became a party, it could lead evidence in opposition to Ms. Wentworth's admission; the third was whether the Judges who constituted the Court of Appeal should disqualify themselves on the ground of apprehended bias by reason of their involvement in earlier proceedings to which Ms. Wentworth had been a party. Each of their Honours held that he should not sit to determine Ms. Wentworth's application for admission but only after ruling against Ms. Wentworth on the first two issues. This appeal is brought from that part of the decision which deals with those first two issues and an order, made in consequence of the decision, dismissing Ms. Wentworth's motion that the Bar Association be dismissed from the proceedings.

The argument that the Bar Association should be dismissed from the proceedings was largely based on the provisions of the Act which confer specific powers and functions on the Bar Council with respect to barristers and candidates for admission to the Bar. One important function is the issuing of practising certificates (By s. 25(1)(a) a person may not "practise as a barrister without being the holder of a current practising certificate issued by the Bar Council"). Another is the investigation of complaints of professional misconduct (s. 133). And of direct relevance to this appeal, the Act provides, in s. 51(b), that the Bar Council may:

> appear by Counsel before, and be heard by, the Supreme Court in the exercise of the functions of the Supreme Court -
>
> (i) under this Act or otherwise, in relation to barristers; or
>
> (ii) in relation to candidates for admission as a barrister.

The Act confers no powers or functions on the Bar Association with respect to the regulation or discipline of barristers. And, it confers no right of appearance on it like that conferred on the Bar Council by s. 51(b).

The argument also relied on the partial repeal of the Charter of Justice 1823 ("the Charter", referred to in s. 4(4) of the Act as "the Supreme Court Charter"). Clause X of the Charter authorized the Supreme Court:

> to admit so many ... fit and proper persons to appear and act as Barristers, Advocates, Proctors, Attorneys, and Solicitors as may be necessary, according to such general rules and qualifications as the ... Court shall for that purpose make and establish.

It was usual practice, prior to the partial repeal of the Charter by s. 4(4) of the Act, for the Bar Association to appear to oppose the admission or readmission of barristers (See, for example, *In re Irvine* [1909] 26 WN (NSW) 152; *Ex parte Davis* [1949] 50 SR (NSW) 158; *Ex parte Davis* [1962] 79 WN (NSW) 856; *New South Wales Bar Association v. Davis* [1963] 109 CLR 428; *Re B* [1981] 2 NSWLR 372.) who were not considered "fit and proper persons" and, in disciplinary matters, to apply for the removal of a barrister's name from the roll (see, for example, *In re Davis* [1947] 48 SR (NSW) 33; *In re Davis* [1947] 75 CLR 409; *In re John Cameron Foster* [1950] 50 SR (NSW) 149; *In re Clyne; Ex parte New South Wales Bar Association* [1961] SR (NSW) 104). However, on occasion, proceedings were taken or defended in the name of the Bar Council (see, for example, *Ex parte Rofe* [1939] 39 SR (NSW) 124; *Ex parte Korten* [1941] 59 WN (NSW) 29; *Ziems v. The Prothonotary of the Supreme Court of NSW* [1957] 97 CLR 279). Section 51(b) covers both admission and disciplinary proceedings. It was put that, when read in the light of the repeal of the Charter and the conferral of powers and functions on the Bar Council but not on the Bar Association, s. 51(b) indicates a legislative intention that the Bar Association should no longer participate in proceedings with which that sub-section is concerned. In effect, the argument was that s. 51(b) should be construed by application of the Latin maxim *expressio unius est exclusio alterius.*

It has often been said that the *expressio unius* maxim is one that should be applied with caution (see, for example, *Houssein v. Under Secretary of Industrial Relations and Technology (NSW)* [1982] 148 CLR 88, at p. 94; *O'Sullivan v. Farrer* [1989] 168 CLR 210, at p. 215; *Ainsworth v. Criminal Justice Commission* [1992] 106 ALR 11, at pp. 16-17). It can only be applied if "the intention it expresses is discoverable upon the face of the instrument" (*Houssein v. Under Secretary of Industrial Relations and Technology (NSW)* [1982] 148 CLR, at p. 94, referring to *Saunders v. Evans* [1861] 8 HLC 721, at p. 729 [11 ER 611, at p. 615]).

And to the extent that the maxim is concerned with the drawing of an inference (specifically, a negative inference), it can only be applied if the inference is not inconsistent with other provisions of the Act and is otherwise permitted by the ordinary rules of construction.

The nature of proceedings concerned with the admission and discipline of barristers tells decisively against the construction of s. 51(b) advanced on behalf of Ms. Wentworth. There are, of course, differences between admission and disciplinary proceedings. Those differences flow from the different issues involved. However, disciplinary and admission proceedings are alike in that they are not ordinary legal proceedings. Admission proceedings are not directed to the resolution of some contest as to the private rights of disputing parties, as is usually the case with civil proceedings. And as has often been said, disciplinary proceedings are not criminal proceedings (*Weaver v. Law Society of New South Wales* [1979] 142 CLR 201, at p. 207; *Re Veron; Ex parte Law Society of NSW* [1966] 84 WN (Pt. 1) (NSW) 136, at p. 141; *Attorney-General of the Gambia v. N'Jie* [1961] AC 617, at p. 631). Disciplinary proceedings and admission proceedings are "*sui generis*" (*Weaver v. Law Society of New South Wales* [1979] 142 CLR, at p. 207, a case concerned with disciplinary proceedings).

Disciplinary proceedings have been described as proceedings concerned with the protection of the public (*Clyne v. NSW Bar Association* [1960] 104 CLR 186, at pp. 201-202; *New South Wales Bar Association v. Evatt* [1968] 117 CLR 177, at pp. 183-184; *Weaver v. Law Society of New South Wales* [1979] 142 CLR, at p. 207; *Walter v. Council of Qld Law Society* [1988] 62 ALJR 153, at p. 157; 77 ALR 228, at p. 235). And it has been said that, because they have the protection of the public as one of their primary objects, they cannot necessarily be determined on the same basis as adversarial proceedings (*Walter v. Council of Qld Law Society* [1988] 62 ALJR, at p. 157; p. 235 of ALR). That is also true of admission proceedings, although that may be more obvious in cases concerned with readmission. In any event, the right to practise in the Courts is such that, on an application for admission, the Court concerned must ensure, so far as possible, that the public is protected (*Re B* [1981] 2 NSWLR, at p. 380 and see, in relation to readmission, *Incorporated Law Institute of New South Wales v. Meagher* [1909] 9 CLR 655, at p. 661) from those who are not properly qualified and, to use the language of s. 4(2) of the Act, from those who are not "suitable ... for admission". And the consequence is that, as with disciplinary proceedings, admission proceedings are not automatically determined in accordance with rules and procedures applied in ordinary adversarial proceedings.

Both the nature and purpose of admission and disciplinary proceedings indicate that, unless and save to the extent that specific procedures are laid down by statute or by rules of Court, and subject, of course, to the requirements of procedural fairness, they may be conducted in whatever manner the Court considers appropriate to the matter before it. Indeed, that is to be seen in the present case. Ms. Wentworth's application was made before she had completed her examinations and, thus, a question arose as to her qualifications. It was this question that led to an invitation and, subsequently, the grant of leave to the Attorney-General to appear *amicus curiae*.

In *Weaver v. Law Society of New South Wales* [1979] 142 CLR at p. 207, a disciplinary case concerning a solicitor of the Supreme Court of New South Wales, Mason J said that the proceedings were an exercise of the inherent jurisdiction of that Court. The jurisdiction or, more accurately the power to admit, suspend or strike off is one which, of necessity, attends a Court system of the kind with which we are familiar in this country. That power or some aspect of it may be conferred by statute. But even if it is, it is a conferral of what would have existed in any event as inherent power, existing as a matter of necessity in the interests

of justice and its administration. And as earlier indicated, it is a power which carries with it, unless contrary provision is made, the power to adopt whatever procedures are considered appropriate.

There are certain matters in relation to which legislative provisions will be construed as effecting no more than is strictly required by clear words or as a matter of necessary implication (see *Bropho v. Western Australia* [1990] 171 CLR 1, at pp. 17-18 for a general statement of the rule).

They include important common law rights (*ibid.*, at pp. 17, 18; see also *Corporate Affairs Commission (NSW) v. Yuill* [1991] 172 CLR 319, at pp. 322, 338 and cases there cited, 346-347. As to property rights, see *American Dairy Queen (Q'ld.) Pty. Ltd. v. Blue Rio Pty. Ltd.* [1981] 147 CLR 677, at pp. 682-683. As to the right to carry on business, see *The Commonwealth and the Postmaster-General v. The Progress Advertising and Press Agency Co. Proprietary Ltd.* [1910] 10 CLR 457, at p. 464), procedural (as to procedural fairness, see *Annetts v. McCann* [1990] 170 CLR 596, at p. 598 and cases there cited; *Ainsworth v. Criminal Justice Commission* [1992] 106 ALR, at p. 17) and other (as to the privilege against self-incrimination, see *Hammond v. The Commonwealth* [1982] 152 CLR 188, at pp. 197-198, 200; *Sorby v. The Commonwealth* [1983] 152 CLR 281, at pp. 289-290, 294-295, 309, 311; *Hamilton v. Oades* [1989] 166 CLR 486, at pp. 495, 500-501. As to the right to trial by jury, see *Tassell v. Hayes* [1987] 163 CLR 34, at pp. 41, 50. As to the right to personal liberty, see *Re Bolton; Ex parte Beane* [1987] 162 CLR 514, at p. 523. As to legal professional privilege, see *Baker v. Campbell* [1983] 153 CLR 52, at pp. 96-97, 104, 116-117, 123; *Corporate Affairs Commission (NSW) v. Yuill* [1991] 172 CLR, at pp. 322, 331, 338, 348-349) safeguards of individual rights and freedoms and the jurisdiction of superior Courts (See *Clancy v. Butchers' Shop Employees Union* [1904] 1 CLR 181, at pp. 196-197, 204; *Hockey v. Yelland* [1984] 157 CLR 124, at pp. 130, 142; *Bropho v. Western Australia* [1990] 171 CLR at p. 17; *Public Service Association (SA) v. Federated Clerks' Union* [1991] 173 CLR 132, at p. 160).

In *Cameron v. Cole* Rich J said ([1944] 68 CLR 571, at p. 589):

> in the absence of clear words, a statute should not be treated as depriving a Court of the inherent jurisdiction possessed by every Court to ensure that trials before it are conducted in accordance with the principles of natural justice.

Given that superior Courts are possessed of inherent jurisdiction and inherent powers because they are necessary in the interests of justice (*Cocker v. Tempest* [1841] 7 M & W 502, at pp. 503-504 [151 ER 864, at p. 865]; *Jackson v. Sterling Industries Ltd.* [1987] 162 CLR 612, at pp. 638-639; *Hamilton v. Oades* [1989] 166 CLR at p. 502), that statement necessarily applies to every aspect of that jurisdiction and those powers.

Because s. 51(b) is concerned with proceedings with respect to a matter which, statute apart, involves the inherent jurisdiction or powers of the Supreme Court, it must be construed on the basis that it does no more than it clearly says or than is necessarily to be implied.

It was not put that anything in the Act necessitates an implication of the kind advanced on behalf of Ms. Wentworth. And, by its terms, the sub-section does no more than confer an absolute right on the Bar Council which it would otherwise not have, in the sense that it would otherwise be necessary for it to obtain leave to appear. The express conferral of that right indicates that, *prima facie*, it is the Bar Council, rather than the Bar Association, that should be involved in proceedings falling within s. 51(b). Hence, *prima facie*, the Bar Association should be given leave to appear only in exceptional circumstances, whether or not the Bar Council is also participating. Thus, s. 51(b) may well affect the discretion of the

Supreme Court with respect to the conduct of proceedings falling within that subsection. But apart from conferring an absolute right on the Bar Council, it does not affect the Court's power to determine how the proceedings are to be conducted, including who may participate and with respect to what issues.

So far as Ms. Wentworth's application sought orders against the Bar Association it involved an issue over and above that of her admission to the Bar, and the Bar Association was a necessary party to the proceedings. That being so, the matter was exceptional and the participation of the Bar Association, rather than the Bar Council, on the issue of admission was both convenient and appropriate. And, considerations of costs and convenience indicate that remains so, notwithstanding the statement in this Court that Ms. Wentworth no longer seeks orders against the Bar Association.

The second argument made on behalf of Ms. Wentworth is that, under s. 51(b), the Bar Council may not lead evidence on matters going to the question whether she should be admitted. There are two peculiar features to this argument. First, it is directed to the powers and functions of a body which, as such, is not a party to the proceedings. However, Mr. Hulme, senior Counsel for the Bar Association, indicated that he was in a position to speak for the Bar Council and to say all that it would wish to say on this issue. Secondly the practical effect of the argument is largely dependent on the success of the first argument. The first argument having failed, s. 51(b) does not affect the power of the Supreme Court to allow the Bar Council to call evidence even if the right to appear and be heard conferred on it by s. 51(b) does not extend so far.

There are two strands to the second argument. The first is that, in their ordinary and natural meaning, the words "appear .. and be heard" in s. 51(b) do not extend to the calling of evidence. The second is that the partial repeal of the Charter indicates that the words do not extend to confer on the Bar Council a right to call evidence.

Unless there is something to indicate to the contrary, the expression "appear and be heard" and its variations, such as "appear by Counsel .. and be heard" which is involved in the present case, when used in relation to Court proceedings or, indeed, any proceedings directed to a hearing and determination of some disputed matter, signify a right to participate fully in those proceedings (*cf. The Queen v. Justices of London* [1896] 1 QB 659 concerning the right of a committee to appear by its clerk). The right may be expressly qualified, as, for example, where it is confined to a specific issue. On the other hand, a qualification may arise, as a matter of implication, because of the issues involved, the nature of the interest affected or the like. But in the absence of an express or implied qualification, it is a right of full participation.

The second strand of the argument advanced on behalf of Ms. Wentworth is that, by the partial repeal of the Charter, the issues in admission proceedings have been narrowed so that it is no longer an issue whether a person is "fit and proper". It is to be implied from this, it was said, that s. 51(b) does not confer a right to call evidence.

The terminology of the criterion for admission may have changed, so that the precise question, in terms of s. 4(2), is whether the person is "suitable ... for admission", rather than whether he or she is a "fit and proper person" as was previously required by the Charter. But that is a mere change in terminology which cannot affect the nature of the Court's duty to have regard, in admission proceedings, to the protection of the public. And it clearly appears from s. 4(2) that no change in the nature of the Court's duty was intended, for, by that subsection,

the Supreme Court must "hear and determine" an application for admission, even though the person concerned has been approved as a suitable candidate by the board. Thus, the change of terminology affects neither the nature of the issues to be determined nor, as was argued, the nature of admission proceedings.

Neither the partial repeal of the Charter effected by s. 4(4) nor anything else in the Act detracts from or limits the right of appearance conferred on the Bar Council by s. 51(b). Accordingly, it is a right of full participation. And, so far as a right of that kind is concerned with resisting or countering a case made by another, it involves the right to test that case, including the evidence called. And it also involves the right to put a case to the contrary. So much emerges from the cases concerned with procedural fairness (*Board of Education v. Rice* [1911] AC 179 at p. 182; *National Companies and Securities Commission v. News Corpn. Ltd.* [1984] 156 CLR 296, at pp. 314-315; *Kioa v. West* [1985] 159 CLR 550, at p. 569).

As with the right to procedural fairness, the precise content of a right to participate fully in proceedings may vary according to the procedures laid down or adopted. And as already indicated, the procedures in admission and disciplinary cases are, to a large extent, in the hands of the Supreme Court itself. But even so, that does not affect the right of the Bar Council to put its case, including by presenting evidence relevant to the question whether Ms. Wentworth is "suitable ... for admission". And, so long as ordinary Court procedures are adopted, that involves the right to present sworn evidence.

It follows from what has been said with respect to the first issue in this appeal, that the Supreme Court may permit the Bar Association to present sworn evidence on the question of whether Ms. Wentworth is "suitable ... for admission".

The appeal should be dismissed.

Also found at [1992] 3 CLJ 1511